bearing collaterally upon the questions discussed. *Lucas* v. *Case*, 9 Bush 297, was an action for libel against a committee of the church of which the plaintiff was a member, and before whom he had been summoned to answer a charge of immorality. The committee found him guilty of the charge and so reported. The court held the action could not be maintained, saying, "In pronouncing the result of their deliberations, in reporting the same in writing to the church they will be protected by the law, if they acted in good faith and within the scope of their authority. Whether in what the church did it acted right or wrong, this court cannot approach its precincts to inquire, and is powerless to redress any alleged wrong inflicted on the plaintiff thereby. By becoming a member of the church he subjected himself to its ecclesiastical power, and neither this nor any earthly tribunal can supervise or control that jurisdiction."

McMillan v. *Birch*, 1 Binn. 178, was an action of slander. The defendant, a Presbyterian minister, having been cited by the plaintiff, also a minister, to answer before presbytery for unchristian conduct and teaching, in his defence before the presbytery called the plaintiff "a liar, drunkard, and preacher of the devil," and it was held that as the words had been spoken in a quasi court of justice, without any evidence of express malice, they were in the nature of a privileged communication and not actionable.

Dieffendorf v. *The Reformed Church*, 20 Johns. 12, was an action against a subscriber to recover the amount of his subscription to the support of a minister. The defendant offered to show that the minister was a man of immoral character, but as it appeared that this charge had been preferred before a church judicatory and by them tried and dismissed, the evidence was not admitted.

The signing of a subscription paper, whereby the defendants agree to contribute the sums severally affixed to their names for the support of a minister, does not render them jointly liable for the whole salary, but each one may be sued for the amount of his individual subscription: *Riddle* v. *Stevens*, 2 S. & R. 537.

But, though the decrees of ecclesiastical courts may not be reviewed by the civil courts, when the subject-matter of the decree is ecclesiastical, if an ecclesiastical court undertakes to legislate in affairs purely temporal, their proceedings are purely *ultra vires* and void, as when a board of reference, appointed under the canons of the Protestant Episcopal Church, endeavored to adjust certain pecuniary disputes which had arisen between a rector and his parish, on account of money advanced and expended by the rector in the construction of a chapel. An award by the board in a case of this kind is of no force at all: *Bradbury* v. *Birchmore*, 117 Mass. 569.

R. C. D., Jr.

Supreme Court of Vermont.

DORAN *v.* SMITH.

Infancy is a bar to an action on the case for false and fraudulent representations by a vendor or pledger as to his ownership of property sold or pledged.

Case. The declaration alleged, that the defendant at, &c., on, &c., intending to deceive and defraud the plaintiff, and to induce him to purchase a certain gold pin then and there in the hands and possession of the defendant, did falsely, fraudulently, and deceitfully

represent to the plaintiff that said pin was then and there the property of the defendant, and that he had title thereto, and good right and lawful authority to sell the same; that the plaintiff, confiding in the said affirmation of the defendant, and believing the same to be true, then and there did buy said pin of the defendant, and pay him therefor the sum of fifteen dollars; that the defendant was not the owner of said pin, and had no title to nor interest in the same, and no right nor authority to sell the same to the plaintiff, but said pin was the property of another person, to wit, &c., and that said owner reclaimed said pin, and took it from the possession of the plaintiff, whereby, &c.

The declaration also contained a count alleging the transaction as a pledge, with like false and fraudulent representations, and a count in trover.

Defendant pleaded infancy, and plaintiff demurred. The court overruled the demurrer, and adjudged the plea sufficient; to which the plaintiff excepted.

Nicholson & Baker, for the plaintiff, cited Schouler's Dom. Rel. 563; 2 Kent Com. 241; *Badge* v. *Pinney*, 15 Mass. 359; *Elwell* v. *Martin*, 32 Vt. 217; *Fitts* v. *Hall*, 9 N. H. 441; *Towne* v. *Wiley*, 23 Vt. 355; *Wallace* v. *Mores*, 5 Hill 391; *West* v. *Moore*, 14 Vt. 447; *Walker* v. *Davis*, 1 Gray 506; *Vasse* v. *Smith*, 6 Cranch 226; *Homer* v. *Thuoug*, 3 Pick. 429; *Green* v. *Sperry*, 16 Vt. 320; *Baxter* v. *Bush*, 29 Id. 465; *Mathews* v. *Cowan*, 59 Ill. 341; *Gilson* v. *Spear*, 38 Vt. 311.

Warren H. Smith, for the defendant, cited *Gilson* v. *Spear*, 38 Vt. 311; *Graves* v. *Neville*, 1 Keble 778.

The opinion of the court was delivered by

PIERPOINT, C. J.—This action is brought against the defendant to recover the damage which the plaintiff claims to have sustained in consequence of the defendant's having made false and fraudulent representations to him as to his, the defendant's, title to and ownership of certain property which the plaintiff, relying upon such representations, purchased of him and paid him therefor, when in fact the defendant had no title whatever to the property. The defendant pleads infancy, and the plaintiff demurs to the plea.

The representations alleged in the declaration are of the same character, and stand upon the same principles, as representations as

to the quality of the property—they enter into and constitute an element of the contract itself; it is that that makes them actionable. The contract must be alleged and proved, or there can be no recovery. The contract is the basis of the actio: ; the fraud is predicated upon the contract. This being so, this case comes clearly within the case of *Gilson* v. *Spear*, 38 Verm. 311, and must be governed by it. It is there decided that in cases like the present, a plea of infancy is a full defence. The subject is so fully and ably discussed by Judge KELLOGG, in the opinion in that case, that to enlarge upon it here would be a waste of time.

Judgment affirmed.

This decision seems to be well supported both by principle and authority.

That a minor is liable for his pure torts, unconnected with any contract, as assault and battery, slander, trespass to real or personal property, &c., is elementary law.

That he is not bound on his ordinary contracts, unconnected with any tort, is equally clear. The difficulty arises when there is a combination of a contract and a tort.

On the one hand it is asserted that if the tort is an inherent part of the contract, inseparable from it, and not a distinct, independent act, either preceding or subsequent to the contract, the minor is not liable *tort-wise*, if he would not have been held *contract-wise* on the same state of facts.

It was on this ground that an infant innkeeper was held not liable in tort for the loss of his guest's goods, when he was protected by his infancy from a suit on contract for non-delivery of the same goods: *Crosse* v. *Andross*, Mich. 40, 41 Eliz. B. R.; stated in 1 Rolle Ab. 2, *Action sur case*, D. 3.

So an infant carrier who did not deliver the goods according to the agreement, was held not liable for them in the admiralty court. Pasch., 11 Car. B. R.; *Furnes* v. *Smith*, 1 Roll. Ab. 530.

So too, if in a sale of goods, he falsely and fraudulently represents that he owns them, or that they are of a different kind and character from what he knows them to be, he is not liable in tort for the fraud; for that is an inherent part of the contract. Without the contract there is no actionable fraud against any one, as the fraud without the contract would be harmless; and as the infant may avoid the *entire* contract, he may also escape from the fraudulent part of it; since the incident falls with the principal. This was the old case of *Grove* v. *Neville*, 1 Keb. 778 (1664); directly followed in *Gilson* v. *Spear*, 38 Verm. 311 (1865); *Heath* v. *Mahoney*, 7 Hun 100 (1876).

So too, if a minor hire a horse to drive from A. to B. and *within that distance* he injures the animal by careless overdriving, he cannot be sued in tort, inasmuch as it was but the careless manner in which he was executing his contract, and as he could not be sued on the contract to return him in good condition, he will not any more be liable for the same act when set up by the plaintiff as a tort. *Jennings* v. *Rundall*, 8 T. R. 335 (1799), recognised as sound law in 8 Exch. 146. See also *Eaton* v. *Hill*, 50 N. H. 235 (1870); *Moore* v. *Eastman*, 4 N. Y. Sup. Ct. 37 (1874). *Schenck* v. *Strong*, 1 South. 87, recognises the same rule, although there is reason to believe that there was also a tort in that case outside of and beyond the contract, for which the minor might

have been liable in some form of action. So, if in a sale of goods he fraudulently warrants the same, he is not liable in tort for the deceit, because it was an integral part of the contract, and as the contract is *altogether* voidable the fraud goes for nothing: *Green* v. *Greenbank*, 2 Marsh. 485 (1816); *West* v. *Moore*, 14 Verm. 447 (1842); *Prescott* v. *Norris*, 32 N. H. 101 (1855). He is not liable for such an act, when sued in tort, simply because he would not be liable contract-wise, notwithstanding the fraud: *Morrill* v. *Aden*, 19 Verm. 505 (1847).

On the other hand, if the tort is a separate, independent fact, or a wilful act outside of the contract, the infant has been held liable for it, although the opportunity to commit it may have been in consequence of some contract.

Thus if goods be bailed to him for a specific purpose, and contrary to his instructions he wilfully converts them to his own use, he is liable in trover therefor, although they came into his possession in virtue of a previous contract: as when a supercargo, in violation of his instructions to sell the goods at Norfolk, Va., shipped them to the West Indies in the name of a third party, it was *held*, that, although not liable on contract for breach of his instructions, he was liable in trover for the conversion: *Vasse* v. *Smith*, 6 Cranch 226 (1810). See also *Mills* v. *Graham*, 4 B. & P. 140, that trover would lie, if an infant bailee refuses to re-deliver the goods when the bailment is ended.

So, it was held in *Homer* v. *Thwing*, 3 Pick. 492 (1826), that if an infant hires a horse to drive from A. to B., and he drives to C. and injures the animal by over-driving, he is liable in trover for the conversion, although he came into possession of the property under a contract with the owner, and although it was contended by the defendant that the action was founded on contract, and the defendant could not be ousted of his defence by changing the form of action from contract to tort. A similar result was arrived at in *Towne* v. *Wiley*, 23 Verm. 355 (1851), and in *Fish* v. *Ferris*, 5 Duer 49 (1855), though *Wilt* v. *Welsh*, 6 Watts 9, is *contra*.

So, in *Campbell* v. *Stakes*, 2 Wend. 139 (1828), it was held that if an infant wilfully and intentionally beats and cruelly treats an animal bailed to him so that it dies, he is liable in tort, notwithstanding the contract of bailment; since his wrongful act terminates the bailment. But if the same result is caused solely through the infant's "unskilfulness, want of knowledge, discretion and judgment," his infancy is a complete defence, since the duty to exercise such care and skill is a matter of implied contract from the fact of bailment; and as he is not liable contract-wise, he could not be as for a tort.

In *Lewis* v. *Littlefield*, 15 Maine 233 (1839), the plaintiff put money into a minor's hands, a stakeholder, to abide the result of an illegal wager. After notice from the plaintiff not to pay it to the winner, he did so; and it was held he was liable in trover to the depositor, notwithstanding the money came into his hands by consent of the plaintiff and under a contract with him to pay it to the winner; but it is to be noted that the contract itself was tainted with illegality.

In *Green* v. *Sperry*, 16 Verm. 390 (1844), a minor borrowed a watch of the owner's wife, but without any authority in her to lend it, and neglected to return it for an unreasonable time after a demand, and he was held liable in trover, notwithstanding his infancy, on the ground of a conversion, and that there never was any valid contract by which he came into possession of the watch.

In *Baxter* v. *Bush*, 29 Verm. 465 (1857), an infant had taken a lease of a farm, with a stipulation therein that the lessor should have a lien on all the

crops and produce as security for the rent. He did not pay the rent, converted the crops to his own use, and refused to deliver them on demand of the lessor: *Held*, liable in trover for their value.

In like manner in *Barnard* v. *Haggis*, 14 C. B. (N. S.) 45 (1863), a minor hired a mare merely for a ride and expressly not to be used for jumping fences; he allowed his friend to ride the mare, and in jumping a fence she fell upon a stake which caused her death. It was *held*, that the infant was liable in tort: WILLES, J., saying, "It appears to me that the act of riding the mare into the place when she received her death-wound was as much a trespass, notwithstanding the hiring for another purpose, as if, without any hiring at all, the defendant had gone into a field and taken the mare out and killed her. It was a bare trespass, not within the object and purpose of the hiring. It was not even an excess. It was doing an act toward the mare, which was altogether forbidden by the owner."

And in *Eaton* v. *Hill*, 50 N. H. 235 (1870), it was maintained with much force of reasoning, that whenever the tort is wilful, as when an infant bailee wilfully uses the property for a different purpose, wrongfully sells it, or refuses to return it on demand, this determines the contract of bailment, and the infant is liable, like an adult, either in trover for the conversion, or in an action on the case. This decision seems to put the liability on the true ground, and holds that the liability of the infant depends not upon the form of the action, but upon the fact whether the tort was merely constructive, or an actual, positive and wilful act of the infant.

Thus we have two classes of cases arriving at directly opposite results. It has been suggested that this distinction between the adjudged cases exists in consequence of a difference *in pleading*; that the *form* of the action determines the liability; and that an action *on the case* for the tort will not lie, because the declaration in that action shows on its face that the tort is merely constructive, being but in effect a breach of contract; and, therefore, that infancy is a complete defence either when pleaded in bar, or shown in evidence under the general issue. Whereas *trover* might lie on the same state of facts, because in trover the nature of the liability does not appear from the declaration; and it cannot be told whether the action is brought for a pure tort, or such merely constructive conversion as consists only in a breach of contract. That may be so, if the action should be decided wholly upon the pleadings; as, if infancy should be set up by a plea in bar, to which the plaintiff demurs. In such case if the declaration is in trover or trespass the plea would not set up an absolute and universal defence; whereas if the declaration is in case, disclosing the contract and a breach of it, infancy would be a good plea. But if infancy is relied on at the trial by way of evidence, it is not easy to see why it should not be as available, if the action were trover, as if it were case. In either the plaintiff does not recover upon the strength of his declaration, but upon the evidence, and evidence of infancy should have the same effect in both forms of action.

The difference between these two classes of cases seems to be rather in the *mode* of setting up the defence of infancy than in the effect of it when proved. In declarations on the case disclosing the contract, if it therein appears to be a mere breach of contract, and so only a constructive tort, infancy may be safely relied upon as a plea in bar, to which a demurrer could not well be taken. But if, on the other hand, the declaration be in trover or trespass, a plea of infancy in bar is not safe, since as it is not a defence to *all* such actions, the plaintiff might demur; and the more

proper way therefore would be to plead the general issue and give the fact of infancy in evidence under it. This was the course approved in *Vasse* v. *Smith*, *supra*. But the question of liability ought not to depend upon the mere form of the declaration, but upon the nature and character of the act done.

The most satisfactory rule then seems to be that a minor is not liable either in case or in trover for a mere constructive tort to property lawfully in his possession under a contract, such as a mere careless overdriving a horse within the limits contracted for, or neglect to give him food or water; but if he wilfully commits a positive tort outside of and beyond his contract, as by driving beyond the place for which he had hired him, or by cruelly and wantonly killing him, or selling him, though still within the time and limits of his contract, he is liable, and in the same form of action as would be proper against an adult in like circumstances.

Or, perhaps, the rule may be safely stated thus: when the tort of an infant is of such a nature that an action of contract, as well as tort, would lie therefor against an *adult*, the infant cannot be held liable either in trover or on the case, since he would not be on the contract; but when the tort is such that trover or trespass only, and not an action of contract, would lie against an adult, the infant may be charged in tort, as it becomes a pure and absolute tort, and nothing more or less.

Thus, for a default as innkeeper, carrier or other bailee, for a false and fraudulent warranty or affirmation in a contract, an adult may be liable contract-wise as well as in tort, and for such wrongs the infant is liable in neither form; but for wilful and positive injury to property bailed, for using it for a purpose entirely different from that contemplated in the bailment, by selling it as his own, by refusing to re-deliver it after the bailment is terminated, trover is the proper remedy against an adult, and in such cases the infant is liable as well, and in the same form of action.

So, if an adult bailee misuses a hired horse *on the journey*, an action on the case will lie: *Rotch* v. *Hanes*, 12 Pick. 136 (1831); but if he drives him beyond the agreed distance, sells him or wilfully kills him, trover or trespass and not case is the proper remedy: *Wheelock* v. *Wheelwright*, 5 Mass. 104; *Woodman* v. *Hubbard*, 25 N. H. 67 (1852); *Penrose* v. *Curren*, 3 Rawle 351; *Lucas* v. *Trimball*, 15 Gray 306. In the former case the infant is not liable in tort, in the latter he is.

The question still remains upon the application of this rule to a particular state of facts. Is a minor liable to an action for deceit in falsely and fraudulently representing himself to have been of full age, and so induced the plaintiff to have entered into a contract which he has subsequently avoided to the plaintiff's injury? That such fraud does not *at law* estop the minor when sued on the contract from setting up his infancy and does not make him liable, *on the contract*, is abundantly settled: *Bartlett* v. *Wells*, 1 B. & S. 836; *DeRoo* v. *Foster*, 12 C. B. (N. S.) 272; *Brown* v. *McCune*, 5 Sandf. 224; *Merriam* v. *Cunningham*, 11 Cush. 43; *Studwell* v. *Shafter*, 54 N. Y. 249; *Buxley* v. *Russell*, 10 N. H. 184.

And because he could not be held upon his contract, but might avoid it, fraud and all, it was very early held he could not be mulcted in an action of tort for the deceit. Such was the early case of *Johnson* v. *Pie*, 1 Sid. 258; 1 Lev. 169; 1 Keb. 905–913, the report of which is stated in *Stikeman* v. *Dawson*, 1 DeG. & Sm. 113, and it has been often approved both in England and in this country. See *Fairhurst* v. *Adelphi Loan Association*, 9 Ex. 429; *Price* v. *Hewitt*, 8 Ex. 146; *Brown* v. *McCune*, 5 Sandf. 224.

On the other hand the Supreme Court

of New Hampshire, and with much strength of reasoning, held in *Fitts* v. *Hall*, 9 N. H. 441 (1838), that in such a case an infant was liable for the fraud in an action of deceit: that the deception was anterior to the contract and the foundation of it, but not an integral part of it; the inducement to, but not the contract itself.

And this case was approved and followed by the Court of Common Pleas in the city of New York: *Eckstein* v. *Frank*, 1 Daly 334 (1863). See also *Kilgore* v. *Jordan*, 17 Tex. 350 (1856).

But whichever be the rule as to the infant's liability to an *action of damages* for the fraud, it is clear that if he still has the goods he has obtained by such fraudulent representations as to his age, the former owner may retake them by replevin, as having never parted with his property in them, because of the fraud: *Badger* v. *Phinney*, 15 Mass. 364; *Mills* v. *Graham*, 4 B. & P. 140. And *Walker* v. *Davis*, 1 Gray 506, seems to hold that if the minor has sold the property so fraudulently obtained, he is liable in trover for the conversion.

This may often be an inadequate remedy, of course, and the distinction between compelling the defendant to surrender the goods on a writ of replevin, or compelling him to pay for them in an action for deceit, is not very broad, but it seems to result from the principles governing the contracts of infants.

EDMUND H. BENNETT.

Supreme Court of Rhode Island.

LYMAN UPHAM *v.* HUGH HAMILL.

A mistake which will entitle a party to relief in equity must be a mistake of fact, without negligence on his part.

Where facts are known, or might be known except for negligence, the ignorance of legal consequences is not a mistake of fact for which equity will grant relief.

A purchaser at an execution sale cannot in equity be excused from consummating his purchase, because, never having attended such a sale before, and not hearing the terms of the sale, he supposed himself to be buying the entire estate in question, and not the "right, title and interest" of the judgment debtor in it.

ASSUMPSIT. On demurrer to equitable plea. The plaintiff, who was a deputy sheriff, sued the defendant for refusing to complete his purchase of certain property which was struck off to him at an execution sale. The property was all the right, title and interest which one Charles Stafford had in certain real estate on the 23d September 1875, and the 7th October 1875, being the days when the property was attached on the original writs in the actions in which the executions issued, under which the sale was made. At the time of the attachments the estate was mortgaged for $1000, and continued under mortgage until after the execution sale. The defendant, who was plaintiff in the earlier action aforesaid, claimed that he bid at the execution sale without having heard the terms of sale, if any were announced, and that, having never before